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CATHY A. CATTERSON
U.S. COURT OF APPEALS

Mosten Mgmt. Co., Inc. v. Zurich-Am. Ins. Group,
Nos. 00-15406/00-15510

KOZINSKI, Circuit Judge, dissenting:

In Brandt v. Superior Court, 693 P.2d 796 (Cal. 1985), the California Supreme Court created a narrow exception to the general rule that parties to a lawsuit bear their own attorney's fees. It provided that an insured can recover attorney's fees expended in an action to recover policy benefits an insurer denied in bad faith. Id. at 798. But, while bad faith is a prerequisite for Brandt fees, the court made clear that fees were not available for "bringing . . . the bad faith action itself." Id.; see also Burnaby v. Standard Fire Ins. Co., 47 Cal. Rptr. 2d 326, 329 (Ct. App. 1995) (noting that Brandt didn't authorize "fees incurred in prosecuting the tortious breach of covenant claim"). Only actions to recover policy benefits—not to prove the insurer's bad faith in denying them—qualify for fees.

Here, Mosten simply claims Zurich breached the implied covenant of good faith and fair dealing; neither the majority nor the district court suggests otherwise. But the implied covenant is a contractual duty, not a contractual benefit (like, say, indemnification). The good faith obligation is simply a means for securing the contractual ends. See Kransco v. Am. Empire Surplus Lines Ins. Co., 2 P.3d 1, 8 (Cal. 2000) (explaining that the covenant prevents either party from doing "'anything which will injure the right of the other to receive the benefits of the

agreement'" (quoting Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200 (Cal. 1958)) (emphasis added)); id. (noting the covenant "mak[es] effective the agreement's promises" (internal quotation marks omitted)). As such, the covenant is not itself a policy benefit for purposes of Brandt; in breach, parties don't sue to obtain the "benefits" of the implied covenant (though they might sue—as Mosten did—for damages). Because Mosten sued for breach of that covenant, and not for the benefits that covenant protects, it cannot rely on Brandt to collect attorney's fees for its suit.[1]

Because Mosten can't satisfy the Brandt requirements for its trial fees, I would also find it can't satisfy those same requirements for its fees on appeal. I respectfully dissent.

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[1] The majority relies on Johansen v. California State Automobile Ass'n Inter-Insurance Bureau, 538 P.2d 744 (Cal. 1975), which preceded Brandt, to suggest that suits alleging breach of the implied warranty of good faith fall within the ambit of Brandt's rule. But, as explained above, Brandt suggested just the opposite; indeed, Brandt itself involved claims for breach of contract and breach of the covenant of good faith and fair dealing, yet drew an explicit line between those fees "incurred in connection with the contract cause of action," and those for proving bad faith.